

Appendix A

FILED
COURT OF APPEALS
JAN 14 2019
CATHY PROSSER WILCOX
CLERK
HANCOCK COUNTY, OHIO

COURT OF APPEALS OF OHIO,
THIRD APPELLATE DISTRICT

Susan Pearsall, Plaintiff-Appellant,

v.

Thomas C. Guernsey, DDS, Et Al.,
Defendants-Appellees.

Case No. 05-18-14

Date of entry: January 14, 2019

JUDGMENT ENTRY

* * *

App. 1

This appeal, having been placed on the regular calendar, is *sua sponte* being assigned and considered on the accelerated calendar pursuant to App.R. 11.1(E) and Loc. R. 12. This decision is, therefore, rendered by summary judgment entry, which is controlling only as between the parties to this action and not subject to publication or citation as legal authority under Rule 3 of the Ohio Supreme Court Rules for the Reporting of Decisions.

Plaintiff-appellant, Susan Pearsall ("Pearsall"), pro *se*, appeals the April 4 and May 14, 2018 judgments of the Hancock County Court of Common Pleas enforcing a settlement agreement and dismissing her complaint against defendant-appellee, Thomas C. Guernsey, DDS ("Guernsey"). For the reasons that follow, we affirm in part and reverse in part.

The facts relevant to the resolution of this appeal are as follows. This case stems from a medical-malpractice complaint filed on February 18, 2016 against Guernsey and Derik E. Utz, DDS ("Utz") (collectively "defendant"). (Doc. No. 1).¹ Defendants filed their answer on April 25, 2016 after the trial court granted them an extension of time to

¹ Pearsall filed her original complaint on October 23, 2014; however, that complaint was dismissed without prejudice by the trial court on February 25, 2015 because Pearsall failed to file an affidavit of merit. (Doc. Nos. 1, 54).

file an answer. (Doc. Nos. 14, 17).² The trial court dismissed Pearsall's complaint against Utz on September 20, 2016, and this court affirmed the trial court's decision on February 27, 2017. (See Doc. Nos. 39, 43, 46, 54, 57); *Pearsall v. Guernsey*, 3d Dist. Hancock No. 5-16-25, 2017-Ohio-681, ¶21.

After the parties exchanged a number of pre-trial motions, the matter proceeded to jury trial on January 29-30, 2018. (See Doc. No. 305). Prior to the end of trial, the parties reached a settlement, the agreement was read into the record, and the trial court discharged the jury. (Jan. 30, 2018 Tr. at 4, 14-15, 19-20).

On February 27, 2018, Guernsey filed a motion to enforce the settlement agreement. (Doc. No. 307). Pearsall filed memoranda in opposition to Guernsey's motion to enforce the settlement agreement on March 15, 2018. (Doc. Nos. 310, 311). The trial court conducted a hearing the motion, and on April 5, 2018 granted Guernsey's motion to enforce the settlement agreement. (Doc. No. 314); (Mar. 22, 2018 Tr. at 3-4).

In its order, the trial court ordered Pearsall to "sign the requested release" within 30 days of the trial court's order and ordered Guernsey "to tender the check in the agreed upon amount to [Pearsall] and file a dismissal entry." (Doc. No. 314). In the alternative, the trial court ordered that (1) if Pearsall

² Guernsey filed a motion for leave to file instanter an amended answer on January 22, 2018, which the trial court granted on January 30, 2018. (Doc. Nos. 270, 301).

"fails to appear * * * by the deadline and/or refuses to sign the release the Court shall sign an order reflecting the agreement and order that this case will be dismissed with prejudice" and (2) if Pearsall "fails to sign the release and/or fails to request the settlement check within the thirty (30) day time period * * *, she will be deemed to have forfeited her right to the award." (*Id.*).

Notwithstanding the trial court's order, on April 30, 2018, Pearsall filed a motion to proceed to trial by jury alleging that Guernsey "is dissatisfied with the original settlement and demands [Pearsall] to sign a second settlement to supersede the original one." (Doc. No. 315). On May 1, 2018, Guernsey filed a memorandum in opposition to Pearsall's motion. (Doc. No. 316).

On May 14, 2018, in accordance with its April 4, 2018 order, the trial court issued an order reflecting the terms of the settlement agreement and dismissed Pearsall's complaint against Guernsey with prejudice. (Doc. Nos. 318, 319).

On June 11, 2018, Pearsall filed her notice of appeal of the trial court's April 4 and May 14, 2018 orders enforcing the settlement agreement and dismissing her complaint, respectively. (Doc. No. 323). She raises one assignment of error for our review.

Assignment of Error

The trial court erred in determining that an enforceable contract exists.

In her assignment of error, Pearsall argues that the trial court erred in concluding that the parties executed an enforceable contract. Specifically, Pearsall contends that the trial court erred by concluding that there was a meeting of the minds as to the essential terms of the settlement agreement. That is, Pearsall argues that "[t]he parties dispute whether there is a contractual duty of [Pearsall] to sign something in a written format as a condition precedent to [Guernsey's] contractual duty to pay [Pearsall]." (Appellant's Brief at 4).

Notwithstanding Pearsall's caption of her assignment of error and summary of her argument on appeal, to properly resolve Pearsall's appeal, we must address whether the trial court erred by dismissing Pearsall's complaint with prejudice after she failed to comply with the trial court's order enforcing the settlement agreement. Inherent in that analysis is whether the trial court properly enforced the settlement agreement.

Civ.R. 41(B) governs involuntary dismissals of civil actions. Under Civ.R. 41(B)(1), "Where the plaintiff fails to prosecute, or comply with these rules or any court order, the court * * * on its own motion may, after notice to the plaintiff's counsel, dismiss an action or claim." "A dismissal under division (B) of this rule and any dismissal not provided for in this rule * * * operates as an adjudication upon the merits * * *." Civ.R. 41(B)(3).

"[T]he notice requirement of Civ.R.41(B)(1) applies to *all* dismissals with prejudice." (Emphasis

sic.) *Ohio Furniture Co. v. Mindala*, 22 Ohio St.3d 99, 101 (1986). Under Civ.R. 41(B)(1), a party has proper notice of an impending dismissal with prejudice when the trial court informs that party that dismissal is a possibility and has had a reasonable opportunity to defend against that dismissal. *Quonset Hut, Inc. v. Ford Motor Co.*, 80 Ohio St.3d 46 (1997), syllabus.

"Judicial discretion must be carefully--and cautiously--exercised before this court will uphold an outright dismissal of a case on purely procedural grounds." *DeHart v. Aetna Life Ins. Co.*, 69 Ohio St.2d 189, 192 (1982). "Despite the heightened scrutiny to which dismissals with prejudice are subject, this court will not hesitate to affirm the dismissal of an action when "the conduct of a party is so negligent, irresponsible, contumacious or dilatory as to provide substantial grounds for a dismissal with prejudice for a failure to prosecute or obey a court order.'" *Quonset Hut* at 48, quoting *Tokles & Son, Inc. v. Midwestern Indemn. Co.*, 65 Ohio St.3d 621, 632 (1992), quoting *Schreiner v. Karson*, 52 Ohio App.2d 219, 223 (9th Dist.1977).

We review an involuntary dismissal with prejudice for an abuse of discretion. *Pembaur v. Leis*, 1 Ohio St.3d 89, 91 (1982). An abuse of discretion suggests the trial court's decision is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983).

Analysis

App. 6

The trial court did not abuse its discretion by dismissing Pearsall's complaint because Pearsall negligently, irresponsibly, contumaciously, or dilatorily failed to comply with the trial court's order enforcing the settlement agreement. Although Pearsall's argument that the trial court erred by enforcing the settlement agreement does not warrant reversal of the trial court's decision dismissing her case, we conclude the trial court did not construct a reasonable journal entry outlining the parties' settlement agreement.

"A settlement agreement is viewed as a particularized form of a contract." *Brotherwood v. Gonzalez*, 3d Dist. Mercer No. 10-06-33, 2007-Ohio-3340, ¶11, citing *Noroski v. Fallet*, 2 Ohio St. 3d 77, 79 (1982). "It is a contract designed to terminate a claim by preventing or ending litigation, and such agreements are valid and enforceable by either party." *Id.*, citing *Continental W. Condominium Unit Owners Assn. v. Howard E. Ferguson, Inc.*, 74 Ohio St.3d 501, 502 (1996). "To be enforceable as a binding contract, a settlement agreement requires no more formality than any other type of contract. It need not necessarily be signed, as even oral settlement agreements may be enforceable." *B.W. Rogers Co. v. Wells Bros.*, 3d Dist. Shelby No. 17-11-25, 2012-Ohio-750, ¶27, citing *Kostelnik v. Helper*, 96 Ohio St.3d 1, 2002-Ohio-2985, ¶15. "Therefore, the interpretation of a settlement agreement is governed by the law of contracts." *Brotherwood* at ¶11, citing *Chirchiglia v. Ohio Bur. of Workers' Comp.*, 138 Ohio App.3d 676, 679 (7th Dist.2000).

"The standard of review to be applied to a ruling on a motion to enforce a settlement agreement depends primarily on the question presented." *Kaple v. Benchmark Materials*, 3d Dist. Seneca No. 13-03-60, 2004-Ohio-2620, ¶ 4. "Generally, if a motion to enforce a settlement agreement surrounds an agreement of undisputed terms, the issue is one of contract law; thus the standard of review is whether the trial court erred as a matter of law." *Moore v. Johnson Industries Corp.*, 10th Dist. Franklin Nos. 96APE11-1579, 96APE12-1638, and 96 APE12-1703, 1997 WL 771015, *12 (Dec. 11, 1997), citing *Continental W. Condominium Unit Owners Assn.* at 502. *See also Kaple* at ¶ 4 ("If the dispute is a question of law, an appellate court must review the decision *de novo* to determine whether the trial court's decision to enforce the settlement agreement is based upon an erroneous standard or a misconstruction of the law."), citing *Continental W. Condominium Unit Owners Assn.* at 502. "De *novo* review requires us to conduct an independent review of the record without deference to the trial court's decision." *Matrix Technologies, Inc. v. Kuss Corp.*, 6th Dist. Lucas No. L-07-1301, 2008-Ohio-1301, ¶11, citing *Brown v. Cty. Commrs. of Scioto Cty.*, 87 Ohio App.3d 704, 711 (4th Dist.1993).

"However, if the agreement's terms are in dispute, the issue of whether the trial judge should enforce the alleged settlement agreement is reviewed under an abuse of discretion standard." *Moore* at *12, citing *Rulli v. Fan Co.*, 79 Ohio St.3d 374, 376 (1997). A trial court does not abuse its discretion by

enforcing settlement agreements "where the record contains some competent, credible evidence to support its findings regarding the settlement."
Bankers Trust Co. v. Wright, 6th Dist. Fulton No. F-09-009, 2010-Ohio-1697, ¶15, quoting *Mentor v. Lagoons Point Land Co.*, 11th Dist. Lake No. 98-L190, 1999 WL 1313674, *4 (Dec. 17, 1999). *See also Kaple* at ¶ 4 ("If the question is an evidentiary one, this Court will not overturn the trial courts finding if there was sufficient evidence to support such finding."), citing *Chirchiglia* at 679. "Where the meaning of terms of a settlement agreement is disputed, or where there is a dispute that contests the existence of a settlement agreement, a trial court must conduct an evidentiary hearing prior to entering judgment." *Rulli* at syllabus.

Here, the parties dispute whether they orally executed a valid and enforceable settlement agreement. In particular, Pearsall argues that the parties did not execute a valid and enforceable settlement agreement because there is no competent, credible evidence of a meeting of the minds as to the essential terms of the settlement agreement. We reject this argument.

As a matter of law, the parties executed a binding contract when they entered into an oral settlement agreement in the presence of the court. "Where the parties in an action * * * voluntarily enter into an oral settlement agreement in the presence of the court, such agreement constitutes a binding contract." *Spercel v. Sterling Industries, Inc.*, 31 Ohio St.2d 336 (1972), paragraph one of the

syllabus. *Accord Triozzi-Hartman v. Hartman*, 11th Dist. Geauga No. 2006-G-2701, 2007-Ohio-5781, ¶9 (Ordinarily, an in-court settlement binds the parties, even if they do not reduce it to writing."). Moreover, the parties preserved the settlement agreement by reading the essential terms of the settlement agreement into the record. *See Ruffian, L.L.C. v. Hayes*, 10th Dist. Franklin No. 09AP-948, 2011-Ohio-831, ¶17 ("An agreement is enforceable if it encompasses the essential elements of the bargain."), quoting *Mr. Mark Corp. v. Rush, Inc.*, 11 Ohio App.3d 167, 169 (8th Dist.1983), citing *Reck v. Daley*, 72 Ohio App. 307, 315-317 (1st Dist.1943). *See also Alligood v. Procter & Gamble Co.*, 72 Ohio App.3d 309, 311 (1st Dist.1991) (stating that the essential terms of a contract include "the identity of the parties to be bound, the subject matter of the contract, consideration, a quantity term, and a price term").

Instead, the disagreement between the parties in this case focuses on the meaning of the essential terms of the contract--that is, the parties dispute the terms of their agreement that are necessary to effectuate the conclusion of the matter. *See Allen v. Bennett*, 9th Dist. Summit No. 23570, 2007-Ohio-5411, ¶14 (noting that the parties' dispute "did not concern the existence of any material term, but instead focused on the meaning of one of those terms"); *Murra v. Farrauto*, 10th Dist. Franklin No. 16AP-347, 2017-Ohio-842, ¶18 (noting that less-essential terms of an agreement include those terms that are "necessary to effectuate the conclusion of the

matter"). Indeed, "[a] dispute over a term's meaning does not necessarily equate to an omission of an essential term that renders an agreement unenforceable." *Ruffian* at ¶18, citing *Allen* at ¶14.

This is true because "[a]ll agreements have some degree of indefiniteness and some degree of uncertainty. In spite of its defects, language renders a practical service. In spite of ignorance as to the language they speak and write, with resulting error and misunderstanding, people must be held to the promises they make."

Id., quoting *Kostelnik*, 96 Ohio St.3d 1, 2002-Ohio-2985, at ¶17, quoting 1 Corbin & Perillo, *Corbin on Contracts*, Section 4.1, at 530 (Rev.Ed.1993). Thus, we conclude that the trial court did not err by concluding that the parties entered into a valid and enforceable settlement agreement. *Compare Murra* at ¶18 (concluding that the parties executed a binding settlement agreement because it was reached in the presence of the court and "[t]he basic economic provisions of the terms of the settlement were stated on the record").

Nevertheless, Pearsall maintains that the trial court erred by enforcing the settlement agreement. Specifically, she disputes the trial court's decision to fashion the less-essential terms of the settlement agreement to effectuate a fair and just result in this case. "If less essential terms are omitted from an agreement, they may be resolved by 'later agreement

or judicial resolution." *Ruffian* at ¶17, quoting *Mr. Mark Corp.* at 169. *See also Tabbaa v. Koglman*, 149 Ohio App.3d 373, 2002-Ohio-5328, ¶33 (8th Dist.) ("Short of laboriously hammering out a handwritten agreement in court the preferred process is to agree to settle on condition that the language (rather than the terms themselves) can be agreed to in the near future. * * * In the event that a party fails to make a good faith attempt to agree on the language the trial judge can (after hearing) determine the terms and construct a reasonable journal entry outlining the agreement."), quoting *Tepper v. Heck*, 8th Dist. Cuyahoga No. 61061, 1992 WL 369283, * (Dec. 10, 1992). "[I]f the court can determine that the parties intended to be bound, it may fashion those less essential terms that were omitted in order to reach a fair and just result." *Ruffian* at ¶17, quoting *Imbrogno v. MIMRx.COM, Inc.*, 10th Dist. Franklin No. 03AP-345, 2003-Ohio-6108, ¶14, quoting *Gurich v. Janson*, 11th Dist. Ashtabula No. 99-A-0006, 2000 WL 173354, *4 (Nov. 17, 2000), and citing *Shaffer v. Triple Diamond Excavating*, 11th Dist. Trumball No. 20090-T-0104, 2010-Ohio-3808, ¶22, and *Aligood*, 72 Ohio App.3d at 311, citing *Litsinger Sign Co. v. Am. Sign Co.*, 11 Ohio St.2d 1, 14 (1967).

Since, the parties disputed what was required of Pearsall under the settlement agreement, the trial court conducted an evidentiary hearing prior to entering a judgment. *See Allen* at ¶16; *Roth v. Roth*, 8th Dist. Cuyahoga No. 89141, 2008-Ohio-927, ¶46-47 (noting that a trial court should hold a hearing when a factual dispute arises as to the parties' in-

court agreement). Prior to the hearing, Guernsey filed a proposed settlement "agreement and order." (Doc. No. 312). Ultimately, after reviewing the transcript from the in-court settlement, the trial court concluded that "it is entirely reasonable for [Guernsey] to expect that a release be part of the bargain." (Doc. No. 314). The trial court further concluded that Guernsey's proposed settlement agreement and order "does not conflict with the terms read into the record"; rather, "the requested language appears reasonable and is necessary to effectuate the agreement and protect both parties." (*Id.*). The trial court further ordered the following:

- 1) Within thirty (30) days, [Pearsall] is directed to appear at counsel's office at a date and time agreeable to both parties, and sign the requested release.
- 2) If the release is properly executed [Guernsey] is directed to tender the check in the agreed amount to [Pearsall] and file a dismissal entry.
- 3) If [Pearsall] fails to appear in counsel's office by the deadline and/or refuses to sign the release the Court shall sign an order reflecting the agreement and order that this case will be dismissed with prejudice. (See Agreement and Order filed under seal by [Guernsey] on March 23, 2018.) [Guernsey's] counsel to retain the settlement check in the agreed amount for a period of thirty (30) days.
- 4) If [Pearsall] fails to sign the release and/or fails to request the settlement check within

the thirty (30) day time period mentioned above, she will be deemed to have forfeited her right to the award. In either circumstance this case will be dismissed with prejudice.

(Doc. No. 314).

Pearsall did not comply with the trial court's order requiring her to sign the release and to request the settlement check within the 30-day time period. Since Pearsall failed to comply with the trial court's order, the trial court adopted Guernsey's proposed agreement and dismissed Pearsall's complaint *with prejudice*. See *Gulling v. Gulling*, 70 Ohio App.3d 410, 412 (9th Dist.1990) ("An in-court settlement agreement may be adopted by the court, incorporated into judgment entry, and enforced even in the absence of written approval by one party."), citing *Holland v. Holland*, 25 Ohio App.2d 98, 101-102 (10th Dist. 1970).

However, although we ultimately conclude that the trial court was correct in enforcing the settlement agreement, we conclude that the trial court overstepped the bounds of its discretion by adopting Guernsey's proposed agreement--namely, the provision requiring Pearsall to sign a release and to forfeit her right to the settlement check if she failed to sign the release. See also *Hundley v. Hundley*, 5th Dist. Holmes No. 16CA002, 2016-Ohio-4618, ¶22 (applying an abuse-of-discretion standard to a trial court's adoption of a proposed entry reflecting the parties' in-court settlement). The trial court's order requiring Pearsall to sign a release and to forfeit her right to the settlement check if she

failed to sign the release does *not* achieve a fair and just result. Moreover, requiring Pearsall to sign a release is superfluous since the trial court dismissed her complaint with prejudice. *See Tower City Properties v. Cuyahoga Cty. Bd. of Revision*, 49 Ohio St.3d 67, 69 (1990) (stating that a dismissal with prejudice bars the refiling of those claims under the doctrine of res judicata).

Ultimately, we conclude that the trial court did not abuse its discretion by dismissing Pearsall's complaint with prejudice. The evidence in the record reflects that Pearsall was notified that the trial court would dismiss her case, *with prejudice*, should she fail to comply with its order and that she willfully disobeyed the trial court's order. *See Justice v. Sears, Roebuck & Co.*, 10th Dist. Franklin No. 91AP-676, 1992 WL 48533, *5 (Mar. 10, 1992) (noting "that conduct demonstrating willful disobedience of a court order or refusal to prosecute the case may justify a Civ.R. 41(B)(1) dismissal"), citing *Pembaur v. Leis*, 1 Ohio St.3d 89 (1982). Indeed, "the settlement agreement was not consummated by the parties by reason of [Pearsall's] refusal to do so when [Guernsey was] 'ready, willing and able.'" *Dick v. Am. Motors Sales Corp.*, 14 Ohio App.3d 322, 323 (1st Dist.1984). Even without the "release" and "forfeiture" provisions of the trial court's order, Pearsall disobeyed the trial court's order enforcing the settlement agreement by filing a motion to proceed to trial.

Further, the record is replete with instances reflecting Pearsall's contumacious behavior throughout the pendency of the case. *See Sazima v.*

Chalko, 86 Ohio St.3d 151 (1999) ("In considering dismissal under Civ.R.41(B)(1), a trial court may properly take into account the entire history of the litigation, including plaintiff's dilatory conduct * * *."). Given Pearsall's conduct to frustrate the judicial process, dismissal was certainly justified. *See Isabel v. Jack Coley Homes, Inc.*, 2d Dist. Montgomery No. Civ.A. 20290, 2004-Ohio-5280, ¶12 ("We find from the record that the plaintiffs and their attorney were given ample and timely notice that their case could be dismissed for failure to prosecute and taking into account the entire history of the litigation, as the trial court did, dismissal was certainly justified on the facts recited by the trial court and presented in the record.").

For these reasons, we conclude that Pearsall's actions were negligent, irresponsible, contumacious, or dilatory and provide substantial grounds for a dismissal *with prejudice*. *See Clay v. Lakeview Farms, Inc.*, 3d Dist. Allen No. 1-09-55, 2010-Ohio-603, ¶24 ("Consequently, due to Clay's actions necessitating the need for the continuance, and Clay's purposeful absence at trial, we find his actions to be 'negligent, irresponsible, [and] contumacious.'"), quoting *Schreiner*, 52 Ohio App.2d at 223. Thus, the trial court did not abuse its discretion by dismissing Pearsall's complaint *with prejudice*. *See Dick* at 324-325 (concluding that the trial court did not abuse its discretion by dismissing the plaintiffs' complaint after the plaintiffs refused to complete the settlement).

Notwithstanding our conclusion that the trial court properly dismissed Pearsall's complaint, we reverse the trial court's order adopting Guernsey's proposed order and order the trial court to issue an order enforcing the settlement agreement that does not require Pearsall to sign a release and awards the settlement check to Pearsall regardless of whether she claims it.

Therefore, Pearsall's assignment of error is sustained in part and overruled in part.

Accordingly, for the aforementioned reasons, it is the order of this Court that the Judgment Entry of the Hancock County Court of Common Pleas be, and hereby is, affirmed in part and reversed in part. Costs are assessed equally to Appellant and Appellee for which judgment is hereby rendered. This cause is remanded to the trial court for further proceedings consistent with this judgment entry and for execution of the judgment for costs.

It is further ordered that the Clerk of this Court certify a copy of this judgment entry to the trial court as the mandate prescribed by App.R.27, and serve a copy of this judgment entry on each party to the proceedings and note the date of service in the docket as prescribed by App.R. 30.

s/ William R. Zimmerman
JUDGE

s/ Stephen R. Shaw
JUDGE

s/ Vernon L. Preston
JUDGE

DATED: January 14, 2019

/jlr

Appendix B

FILED
COURT OF APPEALS
SEP 03 2019
CATHY PROSSER WILCOX
CLERK
HANCOCK COUNTY, OHIO

COURT OF APPEALS OF OHIO,
THIRD APPELLATE DISTRICT

Susan Pearsall,
Plaintiff-Appellee / Cross-Appellant,

v.

Thomas C. Guernsey, DDS,
Defendant-Appellant / Cross-Appellee.

-and-

Derik E. Utz,
Defendant-Appellee.

Case No. 05-19-08

Date of entry: September 3, 2019

App. 19

JUDGMENT ENTRY

* * *

This appeal having been placed on the regular calendar, is *sua sponte* being assigned and considered on the accelerated calendar pursuant to App.R. 11.1(E) and Loc.R. 12. This decision is therefore rendered by summary judgment entry, which is only controlling as between the parties to this action and not subject to publication or citation as legal authority under Rule 3 of the Ohio Supreme Court Rules for the Reporting of Decisions.

Thomas C. Guernsey, DDS ("Appellant") brings this appeal from the February 22, 2019, amended order of the Court of Common Pleas of Hancock County. The entry amended the May 14, 2018, order to comply with an order of this Court. Susan Pearsall ("Appellee") also filed a cross-appeal from this judgment. For the reasons set forth below, we affirm the judgment of the trial court.

This case began with a medical malpractice complaint filed on February 18, 2016. Doc. 1. A jury trial was held on January 29 and 30, 2018, but before a verdict was reached, the parties reached an agreement. Doc. 305. The agreement was read into the record and the trial court discharged the jury. Jan. 30, 2018 Tr. Disagreements arose during the enforcement of the agreement and a motion was filed with the trial court. Doc. 307. The trial court set forth an order on April 5, 2018, which required Appellant to issue a check and file a dismissal entry

and Appellee to sign a release. Doc. 314. If Appellee failed to sign the release or request the settlement check, the trial court stated that it would dismiss the case with prejudice and Appellee would have forfeited her right to the award. *Id.* On May 14, 2018, the trial court entered an order reflecting the terms of the settlement agreement and dismissing the complaint with prejudice. Doc. 318, 319.

Appellee filed a notice of appeal from the trial court's orders. Doc. 323. She raised one assignment of error claiming that the trial court erred in determining that there was an enforceable contract. The appeal was assigned case number 5-18-14. On appeal, this Court affirmed the portion of the judgment dismissing the complaint. However, this Court reversed the trial court's requirements that Appellee sign a release and allowing for the forfeiture of the award. Instead, this court held as follows:

Notwithstanding our conclusion that the trial court properly dismissed [Appellee's] complaint, we reverse the trial court's order adopting [Appellant's] proposed order and order the trial court to issue an order enforcing the settlement agreement that does not require [Appellee] to sign a release and awards the settlement check to [Appellee] regardless of whether she claims it.

Pearsall v. Guernsey, et al., 3d Dist. Hancock No. 5-18-14, at 16 (Jan. 14, 2019).¹ On February 22, 2019, the trial court issued an amended order pursuant to the order of this Court. Doc. 334. In the amended order, the trial court ordered in pertinent part as follows.

- 2. Pursuant to the agreement, [Appellant] shall issue a check in the name of [Appellee] in the amount of █ to be held in perpetuity by * * * counsel for [Appellant].**
- 3. Upon reasonable notice, [Appellee] shall have the right to retrieve the check during regular business hours and must acknowledge receipt of the funds in writing.**
- 4. Pearsall shall not be required to execute a release of all claims as consideration for such payment.**
- 5. The underlying action remains dismissed with prejudice.**

Id. On March 14, 2019, Appellant filed his notice of appeal. Doc. 335. Appellant raises the following assignment of error on appeal.

¹ Appellee appealed the judgment of this Court to the Ohio Supreme Court. The Ohio Supreme Court declined to hear the case. *Pearsall v. Guernsey*, 2019-Ohio-1759.

The trial court erred in issuing its order confirming the settlement of this case without including any of the provisions of its previous Agreement and Order including two specific provisions, which were read into the record and agreed upon in open court at the time the agreement was announced.

On March 25, 2019, Appellee filed notice of a cross-appeal. Doc. 342. Appellee raised the following assignment of error in her cross-appeal.

The trial court erred in ordering that there is some circumstance where [Appellee] must acknowledge receipt of the funds in writing when there is no duty of plaintiff to do so and when the trial court otherwise had no authority to issue such order.

Appellant argues in his assignment of error that the trial court erred by not including all of the prior provisions in the amended judgment entry. However, a review of the amended judgment entry does not show that the prior order was vacated. To the contrary, the language used in the amended order indicates that it was still in effect as implied by the trial court's final finding that the dismissal of the case with prejudice "remains in effect". Additionally, this Court in its prior opinion affirmed the dismissal of the case and the underlying agreement. The only portions of the judgment which were reversed were the requirement of a release and the forfeiture

provision of the settlement check. This court did not vacate the prior order either, instead merely ordering the trial court to issue an order complying with the Court's ruling. The trial court did what was requested. As the underlying order was not vacated, the trial court did not need to repeat everything that was already included.² For this reason the assignment of error is overruled.

In her cross-appeal, Appellee claims that the trial court erred by requiring her to sign a receipt acknowledging she received the check when she picks it up. She appears to argue that this is a breach of the settlement agreement because she never agreed to do so. This Court initially notes that Appellee was required to sign a receipt, not a release. A receipt is defined as "a written acknowledgment that a specified article, sum of money, or delivery of merchandise has been received." The American Heritage Dictionary 1032 (2d College Ed. 1985). Unlike a release, a receipt does not concede any legal rights, it merely shows that one has received something. Attorneys commonly will require a signed acknowledgment when a person receives something of value from the attorney on behalf of a client. "A 'material breach of contract' is a failure to do something that is so fundamental to a contract that the failure to perform defeats the essential purpose of the contract or makes it impossible for the other

² Appellant agreed at oral argument that if the underlying order was still enforceable, the assignment of error was resolved.

party to perform." *Marion Family YMCA v. Hensel*, 178 Ohio App.3d 140, 2008 -Ohio- 4413, ¶ 7, 897 N.E.2d 184 (3d Dist.). The requirement that one sign a receipt acknowledging that he or she was given a check for a large sum of money does not qualify as defeating the essential purpose of the agreement and is thus not a material change to the agreement. Thus, there is no prejudice from the addition of a requirement that a receipt be signed. Appellee's assignment of error raised on cross-appeal is overruled.

Accordingly, for the aforementioned reasons, it is the order of this Court that the Judgment Entry of the Court of Common Pleas of Hancock County is affirmed. Costs are assessed equally between Appellant and Appellee for which judgment is hereby rendered. This cause is remanded to the trial court for execution of the judgment for costs.

It is further ordered that the Clerk of this Court certify a copy of this judgment entry to the trial court as the mandate prescribed by App.R. 27, and serve a copy of this judgment entry on each party to the proceedings and note the date of service in the docket as prescribed by App.R. 30.

s/ John R. Williamowski
JUDGE

s/ Stephen R. Shaw
JUDGE

s/ Vernon L. Preston
JUDGE

DATED: SEPTEMBER 3, 2019

/hls

Appendix C

FILED
MAY 15 2019
CLERK OF COURT
SUPREME COURT OF OHIO

THE SUPREME COURT OF OHIO

Susan Pearsall,

v.

Thomas C. Guernsey, DDS, et al.

Case No. 2019-0304

Date of entry: May 15, 2019

ENTRY

* * *

Upon consideration of the jurisdictional memoranda filed in this case, the court declines to accept jurisdiction of the appeal pursuant to S.Ct.Prac.R. 7.08(B)(4).

App. 27

(Hancock County Court of Appeals; No. 5-18-
14)

s/ Maureen O'Connor
Maureen O'Connor
Chief Justice

The Official Case Announcement can be found at
<http://www.supremecourt.ohio.gov/ROD/docs/>

Appendix D

FILED
JUL 23 2019
CLERK OF COURT
SUPREME COURT OF OHIO

THE SUPREME COURT OF OHIO

Susan Pearsall,

v.

Thomas C. Guernsey, DDS, et al.

Case No. 2019-0304

Date of entry: July 23, 2019

RECONSIDERATION ENTRY

* * *

It is ordered by the court that the motion for reconsideration in this case is denied.

(Hancock County Court of Appeals; No. 5-18-14)

App. 29

s/Maureen O'Connor
Maureen O'Connor
Chief Justice

The Official Case Announcement can be found at
<http://www.supremecourt.ohio.gov/ROD/docs/>